

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.**

Requests for Waiver and/or Review of Decisions)	
of the Universal Service Administrator)	
by)	CC Docket No. 02-6
Chinle Unified School District No. 24)	
Chinle, AZ)	

TO: Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

Chinle Unified School District No. 24 (“CUSD” or “Chinle”) respectfully requests that the Federal Communications Commission (“FCC” or “Commission”) Review two (2) decisions of the Universal Service Administrative Company (“USAC”) that denied its appeals of Commitment Adjustments (“COMADs”) relative to the application information provided below. Since the issues for which review is requested are the same, the two Requests for Review are being consolidated herein.

Chinle asks that if appropriate and necessary, the Commission grant it Waivers relative to the competitive bidding, contract and other issues that USAC found to justify the COMADs on both applications. These Requests for Waiver and/or Review are made pursuant to 54.719 through 54.723 of the Commission’s rules.¹

¹47 C.F.R. §§ 54.719–54.723
Chinle Unified SD 24 FY2006 Requests for Review and/or Waivers

Billed Entity Number: 143224

Application Information:

(1) Form 471 application number 536398:

Billed Entity Number:	143224
Funding Request Number Appealed:	1484194
Date of USAC Appeal Decision Letter:	July 22, 2016
Service Provider:	ComLink Contractors, Southwest, Inc.
SPIN:	143005746

(2) Form 471 application number 531261:

Billed Entity Number:	143224
Funding Request Numbers Appealed:	1470185 and 1470257
Date of USAC Appeal Decision Letter:	July 22, 2016
Service Provider:	INX Inc.
SPIN:	143024659

Contact Information

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USAC'S REASONS FOR DENYING THE APPEAL

For both applications, the reasons contained in the Administrator's Decision on Appeal Letters ("ADALs") are too lengthy to restate herein, so copies of each Letter are attached hereto as Exhibit A and Exhibit B, respectively.

I. STATEMENT IN SUPPORT OF REQUEST FOR REVIEW

A. PREFACING STATEMENT

It must be noted that the Appeals filed relative to USAC's COMADs were filed on January 3, 2011. For no justifiable, or proffered, reasons, USAC took more than five and one-half (5½) years to issue its Administrator's Decisions on these appeals. Once it did, the Administrator's Decisions and associated explanations not only failed to address the vast majority of the issues appealed, but also drew legal conclusions that were wrong since they were not made by an attorney. Nevertheless, after waiting an egregiously long time, USAC relied on its erroneous conclusions as the basis for its decisions.

Making matters worse, on July 25, 2016, USAC issued two Demand Payment Letters ("DPLs"), which cover all three FRNs mentioned in this appeal. Unfortunately, the Funding Commitment Adjustment Explanations ("FCAEs") in these DPLs have muddled the matter even further. It is incredulous that after taking more than 5-1/2 years to issue its decisions, USAC not only failed to address the majority of the issues which were appealed, but also used the DPLs as an apparent supplement to the ADALs. Chinle makes this statement because the explanation within each of the DPLs references the approval of two other issues purportedly approved on appeal, yet these issues were not mentioned at all in the ADALs. In fact, the statements used by USAC in the DPLs addressing "appeal approvals" actually provide further justifications for the COMAD of the funds. Given USAC's handling of this matter, Chinle is

unable comprehend how USAC could issue such deficient Letters, especially since it had so many years to prepare its decisions. Copies of the two DPLs are attached hereto as Exhibit C and D.

Lastly, it needs to be noted that there are certain discrepancies and errors in the audit report that are cause for concern. Although these issues were raised in the Appeals, they were completely ignored by USAC. The most notable discrepancy was for FRN 1484194. The \$570,681.05 in the COMAD Letter (the same amount showing on the USAC Data Retrieval Tool) differs from amount of the disbursement listed by KPMG three (3) separate times in audit findings SL-2008-166_F02, SL-2008-166_F03 and SL-2008-166_F05, all of which show a disbursement for the FRN of \$275,310. 00. In each of these three findings, the auditors recommend rescission for in the full amount of \$275,310. 00 for FRN 1484194. Given the discrepancy in dollars between the auditors' report and the USAC disbursements records, Chinle is unable to be sure which amount should actually be subject to recovery.

B. BACKGROUND ON CUSD #24

Chinle Unified School District No. 24 is a district comprised of seven school buildings and approximately 3,600 students. It has the largest primarily Native American public high school in the entire United States with 99% of the students being *Diné* (Navajo). CUSD #24 is located in a remote corner of Arizona and is the largest school district in the Navajo Nation in both student counts and geographic area, which spans 300 square miles. It is located on the Navajo Nation Reservation amidst 3,000 square miles of rugged terrain. The schools are so widely dispersed that school buses travel many hundreds of miles each day to transport the students. Since the CUSD buildings are subject to temperature extremes ranging from far below zero in the harsh winters to over one hundred degrees in the summers, the district has been forced to postpone

certain projects and often forgoes other needed services due to these issues. Chinle's location is

totally isolated from the conveniences that are available in urban locations; the nearest major city is a four hour drive, which explains why there are very few vendors willing or able to provision service to the district.

CUSD #24 has a strong commitment to using the positive relationship between Navajo culture and the western society to develop each student's ability to function competently in a multicultural society. However, the arid desert climate and geography of the area pose unique challenges to accomplishing the District's goal. Striving to service its predominantly impoverished student population, the needs of CUSD #24 require greater than average commitment and continued perseverance. It has always relied heavily on E-rate funding to help accomplish its goals, particularly when it comes to obtaining adequate broadband, which is crucial given the remoteness of the area.

Despite its noble goals and the difficulties it faces as a District that serves primarily poor Navajo Nation students, over the better part of the past decade USAC has been subjecting CUSD #24 to heightened scrutiny, and is asking for the return of funds stemming back to an FCC-ordered audit that was conducted in 2008.

C. SUMMARY OF ISSUES/FACTS FOR WHICH REVIEW IS REQUESTED

- On November 3, 2010, USAC issued two Notification of Commitment Adjustment Letters ("COMADs") for FRNs 1484194, 1470185 and 1470257;
 - USAC's issuance of COMADs stemmed from KPMG audit report SL-2008-166; a copy of the KPMG report is attached as Exhibit E;
- On January 3, 2011, Chinle's filed Appeals with USAC relative to the COMAD Letters; a copy of the USAC Appeals are attached as Exhibit F;
- Contrary to its customary procedures, USAC took more than 5-½ years to issue its ADALs;
 - USAC never provided any explanations for this highly unusual and protracted delay;

- The ADALs that issued on July 22, 2016 stated the Appeals were “partially approved” but there was not a single word of approval anywhere in the documents;
- The DPLs dated July 25, 2016 also mention that the Appeals were “partially approved” but they too, failed to have a single word of approval, and the two “partially approved” items are actually additional reasons for denying the Appeals;
- The ADALs focused solely on the CUSD’s alleged failure to have contracts in place prior to the filing of its 2006 Forms 471;
 - The explanations provided by USAC in the finding that no contract was in place before the filing of the Forms 471 rendered conclusions of law that were incorrect and which only should have been made by a licensed attorney;
 - In part, USAC based its conclusions on the Arizona School District Procurement Code section R7-2-1001(70) indicating that the 2011 version of the Code is the one it used to make its determination, when the 2005/2006 version is what should have been reviewed;
- Despite the protracted 5-½ year delay, USAC’s ADALs completely failed to address five of the six issues which were raised in the Appeals;
- In addition to failing to address five of the six issues stemming from the KPMG report, USAC also completely failed to address the significant monetary discrepancy that was brought to its attention in the Appeal relative to FRN 1484194;.
- By delaying more than 5-1/2 years to issue its decisions and demand payment letters, USAC is past the (5 year) period of enforcement. In the spirit of the equitable *doctrine of laches*, USAC should be barred from now issuing DPLs for the funds. Surely the Commission has never had the intention of allowing USAC unlimited time to enforce alleged program rule violations, especially almost a decade later.

D. SUPPORTING STATEMENT

In its Decision Letters the USAC Administrator asserts that contracts were not in place prior to the filing of the Forms 471. In its appeal CUSD provided proof that the purchase orders (“P.O.s”) issued to ComLink and INX were recognized as valid under Arizona School Procurement Law. However, USAC drew its own inaccurate conclusions relying on an Arizona Code section from 2011, which post-dated the P.O.s by 5 years. USAC seems to think that because CUSD did not provide evidence of acceptance by each of the vendors that this equates to there being no

acceptance, which was not the case. Additionally, the first time USAC raised this issue was in the ADALs. Since the P.O.s were submitted to them 5-½ years earlier, USAC certainly had plenty of time to reach out to Chinle and ask for proof of the acceptance. Not only did it fail to do so, it made its erroneous conclusion based on that assumption, without pursuing all of the facts. Further, USAC cites Arizona case law enumerating the four basic elements of contract formation, but since it is not an attorney, USAC fails to recognize that by issuing its P.O.s Chinle was accepting ComLink's and INX's proposals, so the element of acceptance that it claims not to have existed unquestionably did. Since the element of acceptance existed, the issuance of the P.O.s created valid contracts. For the reasons stated herein, USAC's COMAD rationale based on contracts not being in place before the filing of the Forms 471 is invalid and the COMAD on this basis is unsupported by the facts.

Although Chinle's 2011 appeal refuted all of the auditor's other allegations, in its ADAL USAC failed to address any of them, and so these other factors should not be considered by USAC as a valid basis for demanding return of the funds.

E. STATEMENT IN SUPPORT OF REQUEST FOR WAIVER

The Commission has repeatedly reiterated its authority under 47 C.F.R. §1.3 to waive rules for good cause shown and has routinely waived compliance for violations when the record contains no evidence of intent to defraud or abuse the E-rate program and where the public interest is better serviced by granting a waiver:

The Commission may waive any provision of its rules on its own motion and for good cause shown. A rule may be waived where the particular facts make strict compliance inconsistent with the public interest. In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. In sum, waiver is appropriate if special circumstances warrant a deviation from the general rule, and such

deviation would better serve the public interest than strict adherence to the general rule. (footnotes omitted)²

Since the Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest and may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis, the Requests for Review and/or Waiver filed by Chinle should be granted. Chinle has abided by all substantive E-rate program rules and had a fair and open competitive bidding process. It did its best to comply with all state, local and E-rate competitive bidding regulations to procure the services necessary to the District's operations. Any potential issues of non-compliance did not compromise this process or violate substantive E-rate program rules.

It will better serve the public interest and prevent this impoverished Navajo Nation School District from incurring substantial financial hardship if the Commission grant it waivers under the special circumstances described herein.

CONCLUSION

Throughout its application process Chinle strove to comply with E-rate program rules and regulations. It followed all core Program rules and committed no fraud, abuse or waste of E-rate funds. In recent years the Commission has recognized the difficulty Native American schools have had with the E-rate application process and have taken steps to offer assistance and outreach. Unfortunately, at the time CUSD prepared its FY2006 applications this assistance was not available, so it did the best it could. After an unwarranted, protracted delay, for USAC to now COMAD the funding for the three FY2006 FRNs is against the public interest, the goals of

² See *Request For Review of Decision of the Universal Service Administrator by Bishop Perry Middle School*, DA No. 06-54; *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).
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the E-rate program, and will create very significant financial hardship for this remotely located, impoverished Navajo Nation school district.

For the reasons stated above, Chinle Unified School District 24 requests that

Commission:

1. Grant its Requests for Review and/or Waivers;
2. Order USAC to reverse its COMAD decisions for the three FRNs contained in this Request and rescind its Demand Payment Letters;
3. As necessary, waive any procedural rules necessary to effectuate the Commission's resultant Orders.

Respectfully submitted,

/s/ Linda Schreckinger Sadler Esq.

Linda Schreckinger Sadler Esq.

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